Supreme Court, U.S.
FILED
JAN 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1100

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

BOB MOZERT, *et al.*,
Petitioners,
v.
HAWKINS COUNTY PUBLIC SCHOOLS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF RESPONDENTS HAWKINS COUNTY PUBLIC SCHOOLS *ET AL.* IN OPPOSITION

TIMOTHY B. DYK
Counsel of Record
JOHN PAYTON
STEVEN A. SCHNEIDER
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

N.R. COLEMAN, JR.
RONALD W. WOODS
MILLIGAN, COLEMAN, FLETCHER, GABY, KILDAY & WOODS
109 S. Main Street
Commerce Union Bank Building
Greeneville, TN 37743
(615) 639-6811

CHARLES HAMPTON WHITE
Attorney at Law
P.O. Box 2808
Nashville, TN 37219
Counsel for Respondents Hawkins County Public Schools, et al.

January 29, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

24

QUESTIONS PRESENTED

1. Whether exposure to ideas offensive to petitioners' religious beliefs in the public school reading curriculum constitutes an impermissible burden under the Free Exercise clause of the First Amendment?

2. Whether the state's compelling interests in education can be achieved if it is required to exempt students who elect to attend public schools from the reading curriculum?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
A. The Schools' Objectives and the Plaintiffs' Objections	2
B. Background to This Controversy	6
C. The History of This Proceeding	7
ARGUMENT	10
CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION BELOW IS CONSISTENT WITH DECISIONS OF THIS COURT, AND THE COURT OF APPEALS DECISION CONSTITUTES AN UNEXCEPTIONAL APPLICATION OF WELL ESTABLISHED PRINCIPLES	10
I. THERE IS NO CONFLICT	10
II. THE COURT OF APPEALS DECISION WAS CORRECT	16
CONCLUSION	19

TABLE OF AUTHORITIES

Cases	Page
Citizens for Parental Rights v. San Mateo County Bd. of Educ., 51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (1975)	15
Davis v. Page, 385 F. Supp. 395 (D.N.H. 1974)	15-16
Duro v. District Attorney, Second Judicial District of North Carolina, 712 F.2d 96 (4th Cir. 1983)	13, 15
Edwards v. Aquillard, 107 S. Ct. 2573 (1987)	13
Florey v. Sioux Falls School District 49-5, 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980)	13-14
Grove v. Mead School District No. 354, 753 F.2d 1528 (9th Cir.), *cert. denied*, 106 S. Ct. 85 (1985)	13, 17
Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934)	16
Hobbie v. Unemployment Appeals Comm'n, 107 S. Ct. 1046 (1987)	11
Hobolth v. Greenway, 52 Mich. App. 682, 218 N.W.2d 98 (1974)	15
McCollum v. Board of Education, 333 U.S. 203 (1948)	18
Medeiros v. Kiyosaki, 52 Haw. 436, 478 P.2d 314 (1970)	15
Moody v. Cronin, 484 F. Supp. 270 (C.D. Ill. 1979)	14
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	2, 11
Roman v. Appleby, 558 F. Supp. 449 (E.D. Pa. 1983)	16
Sherbert v. Verner, 374 U.S. 398 (1963)	11
Smith v. Ricci, 89 N.J. 514, 446 A.2d 501 (1982)	15
Smith v. Board of School Commissioners of Mobile County, 827 F.2d 684 (11th Cir. 1987)	16
Snider v. Virginia, 106 S. Ct. 2911 (1986)	16
Spence v. Bailey, 465 F.2d 797 (6th Cir. 1972)	11
Thomas v. Review Bd., 450 U.S. 707 (1981)	11, 12
Torcaso v. Watkins, 367 U.S. 488 (1961)	11
Valent v. New Jersey State Bd. of Educ., 114 N.J. Super. 63, 274 A.2d 832 (1971)	15

TABLE OF AUTHORITIES—Continued

	Page
Wallace v. Jaffree, 472 U.S. 38 (1985)	13
West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)	11, 12
Williams v. Board of Education, 388 F. Supp. 93 (S.D. W. Va.), *aff'd*, 530 F.2d 972 (4th Cir. 1975)	15
Wisconsin v. Yoder, 406 U.S. 205 (1972)	10-13
Wright v. Houston Independent School District, 366 F. Supp. 1208 (S.D. Tex. 1972), *aff'd per curiam*, 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974)	14-15
Statutes	
Tenn. Code Ann. § 49-6-3001(c)(1) (Supp. 1987)	2
Tenn. Code Ann. § 49-6-3050 (Supp. 1987)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1100

BOB MOZERT, *et al.*,

Petitioners,

v.

HAWKINS COUNTY PUBLIC SCHOOLS, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF RESPONDENTS HAWKINS COUNTY PUBLIC SCHOOLS *ET AL.* IN OPPOSITION

Respondents Hawkins County Public Schools *et al.*[1] respectfully request that this Court deny the petition for a writ of certiorari filed herein on December 31, 1987, to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on Augsut 24, 1987.

STATEMENT OF THE CASE

This case involves the question whether public schools violate the Free Exercise rights of their students when they insist that those who choose to attend public school study the prescribed elementary school reading curriculum.

---

[1] This Opposition is submitted on behalf of Hawkins County Public Schools, Doug Cloud, Conley E. Bailey, Larry Elkins, Harold E. Silvers, Jr., Archie MacMillan, Quentin Dykes, James Salley, Roy Lipe, Robert Cooper, and James Childress.

ing material that presents points of view with which the student may disagree.[8]

In contrast, the plaintiffs believe that the way to teach a child is by directing the child to accept a particular set of values. (TR 720-22). The plaintiffs object to their children being exposed to material in which moral dilemmas are posed and/or the child is encouraged to make his own judgments (TR 718-21), and they object "to teaching that does not define in Biblical terms what values the students should accept." (TR 721). They object, for example, to a teacher or story raising the question of whether lying is acceptable or unacceptable in a particular context and to stories that do not depict lying as resulting in punishment or other bad consequences.[9] The plaintiffs object to their children being exposed to the feelings, attitudes and values of other students, when the views expressed are contrary to the plaintiffs' views. (9a). As described below, they object to their children being exposed to views on many controversial issues unless their views are endorsed as the correct ones. An expert on the teaching of critical reading, who was familiar with the plaintiffs' objections, concluded that "it would be almost impossible" to teach "critical reading consistent with the plaintiffs' religious objections." (TR 1465).

The plaintiffs' objections are inconsistent with a variety of other goals of the public schools' reading program. Tennessee public schools expose students in the reading program to the beliefs and practices of a broad range of other religious groups and to portrayals of women in non-stereotypical roles in order to encourage religious and gender tolerance. (TR 1221, 1344). The plaintiffs object to materials "that expose their children to other forms of

---

[8] TR 1466-68 (Dr. Roger Farr, defendants' reading expert).

[9] Ex. 30 at 5-6; TR 122-23, 131, 137.

religion and to the feelings, attitudes and values of other students that contradict the plaintiffs' religious views without a statement that the other views are incorrect and that the plaintiffs' views are the correct ones." (8a-9a). They also object to repeated portrayals of women in non-traditional roles. (12a, 62a).

In order to enable students to develop as citizens able to understand and to take positions on issues, the public schools expose students to a variety of controversial issues that they may encounter as adults. (TR 1139-40, 1181, 1265-66). The plaintiffs object to the exposure of their children to many controversial issues in the reading curriculum, unless the students are instructed that their own views are the correct ones. With respect to some issues, the plaintiffs' view is that "there would be 'no way' certain themes could be presented without violating [their] religious beliefs," (12a-13a). Thus, the plaintiffs object to material which they view as critical of the free enterprise system, the military, law enforcement, and to discussions of endangered species, disarmament, gun control, abortion, "planetary problems of pollution, world population, hunger, a [need for] conservation of resources," (TR 85-6, 89) and the future of the human race.[10]

While the plaintiffs' religious views affect virtually all aspects of their lives,[11] in other areas, the plaintiff-parents do not attempt to shield the plaintiff-students from the themes to which they object in the reading curriculum. The plaintiffs have not objected to the material taught in subjects other than reading, despite the fact

---

[10] Exs. 36, 43; TR 277-78, 358, 362. The plaintiffs have also objected to the schools efforts to teach them about such contemporary family problems as divorce, death, and suicide, to their children's exposure to stories in which magic is involved and to the schools' attempt to introduce them in the reading program to science education, for example, by teaching them about evolution. (13a).

[11] *See supra* at 2.

that many of the same themes to which they object in the reading curriculum are found in the other subjects. (67a). Moreover, the plaintiff-students are exposed to many of the same themes which plaintiffs find objectionable in the reading curriculum in the course of listening to radio and television, in attending movies, in reading newspapers and magazines, and in interacting with other residents of Hawkins County who do not share their religious views. (TR 432, 640, 736-38, 749, 898, 989). Plaintiffs desire that their children participate in the general life of the community both as children and as adults. (18a).

B. Background to This Controversy.

After the plaintiff-parents began to review the reading textbooks, they decided that they did not want their children reading the material that they objected to, and that they did not want them present in the classroom when the material to which they objected was read aloud or discussed by any other student. (4a). School officials insisted that plaintiffs' children participate in the reading program. However, at various times during the fall of 1983, eight of the plaintiff-students were provided with alternative textbooks and alternative reading arrangements. The textbooks used were older, outdated books. The alternative arrangements involved sending the plaintiff-students to the cafeteria, library or to a separate room and giving them a reading assignment associated with the alternative book. They were provided with no other reading instruction. They had no opportunity to discuss their assignments with the teacher or fellow students.[12] This alternative was characterized by an expert educator at trial as an "abdication" of the schools' responsibility to teach reading. (TR 1470).

---

[12] Amended Joint Stipulation of Uncontested Facts, July 10, 1986, ¶¶ 39-41; TR 233-36, 447, 449.

In November 1983, the Hawkins County School Board rejected these alternative arrangements and adopted a resolution requiring that the Holt textbooks be used as the regular classroom textbooks. (4a). The plaintiff-students were suspended for failure to participate in the reading curriculum. (4a). Since December 1983, most of the plaintiff-students have either been enrolled in religious schools or been taught at home, and many planned to continue to do so even if they prevailed in this litigation. (TR 380-83, 662, 877-78, 966, 972, 985).

C. The History of This Proceeding.

On December 2, 1983, the plaintiffs filed this suit against the Hawkins County Public Schools and school officials, asserting that exposure of the plaintiff-students to the objectionable material violated their constitutional right to freely exercise their religion. (5a). They sought injunctive relief and damages. (55a).

The complaint was initially dismissed in the District Court,[13] but the Sixth Circuit reversed and remanded for a trial on the merits, concluding that there were disputed issues of fact relating to the issues of burden, compelling state interest and the existence of less restrictive alternatives that made summary judgment inappropriate. The Court "express[ed] no opinion on the merits of plaintiffs' claims or those of the defendants . . . ."[14] Following remand, the Tennessee Commissioner of Education intervened in support of defendants. (6a). Defendants stipulated that the plaintiffs' religious beliefs were sincere, and that the material offended plaintiffs' religious beliefs, but they declined to stipulate that plain-

---

[13] *Mozert v. Hawkins County Pub. Schools*, 582 F. Supp. 201, 203 (E.D. Tenn. 1984) (83a-86a); *see also Mozert v. Hawkins County Pub. Schools*, 579 F. Supp. 1051 (E.D. Tenn. 1984). (87a-90a).

[14] *Mozert v. Hawkins County Pub. Schools*, 765 F.2d 75, 79 (6th Cir. 1985). (75a-81a) (81a).

tiffs' religious beliefs were burdened by exposure to the material. (6a).

At trial, it became clear that the public schools required only that the plaintiff-students be exposed to the material in question and that they were not required to believe it. (22a, 35a). Defendants' witnesses demonstrated the importance of learning to read critically both for future effectiveness in dealing with modern life and for success in the other curricular subjects, and the importance of the goals of the reading curriculum.[15]

These witnesses detailed the disruption that would result if plaintiffs were excluded from the reading curriculum but continued to participate in other subjects. Because the school curriculum is integrated, if the plaintiff-students did not participate in the reading program, they would fail to develop skills and cover materials that are essential to the other subjects, but that are taught as part of the reading program. (TR 1268-69). Excusing the children when material to which they objected was taught would be particularly disruptive in grades 1-4, where reading is not a separate subject, but is taught throughout the school day. (3a).

It was also demonstrated that permitting students to be excused from a core curriculum subject because they found the activities of the majority of students to be religiously offensive would introduce an element of religious divisiveness into the public schools that would be antithetical to their historic role of promoting tolerance. This would be harmful to both the students who are excused and to those who remain in the classroom.[16]

It was shown that if plaintiffs were permitted to be excused from a core curricular subject, then others would

---

[15] *See supra,* Part A.

[16] TR 1604-06, 1613-15, 1629. (Testimony of Dr. Robert Coles, professor of child psychiatry at Harvard University.)

demand the right to be excused from aspects of the public school curriculum to which they object, and the result would likely be a flood of demands for exemption, which would be extremely disruptive to the public school system. (TR 1161).

For the most part, plaintiffs presented no evidence on these issues. Indeed, plaintiffs' experts were unfamiliar with plaintiffs' objections except in the most general sense. (TR 846, 851-52, 912, 1032-34, 1056).

Following the trial, the District Court held that the Hawkins County Public Schools were required to permit the plaintiff-students "to attend the Hawkins County public schools without participating in the course of reading instruction. . . ." (71a). On December 18, 1986, after a further hearing, the District Court awarded the plaintiffs $51,531 primarily as reimbursement for the expenses that they incurred in sending their children to Christian schools.[17]

On August 24, 1987, the Court of Appeals unanimously reversed. In an opinion by Chief Judge Lively, the Court of Appeals concluded that "exposure to objectionable material" (11a) was the crux of the plaintiffs' complaint, and that "there was no proof that any plaintiff student was ever called upon to say or do anything that required the student to affirm or deny a religious belief or to engage or refrain from engaging in any act either required or forbidden by the student's religious convictions." (11a). The Court of Appeals then held

> "that the requirement that public school students study a basal reader series chosen by the school authorities does not create an unconstitutional burden under the Free Exercise Clause when the stu-

---

[17] *See* "Memorandum and Orders," Dec. 18, 1986 (49a-53a); "Order," Jan. 7, 1987 (48a). The individual school officials were held immune from damages liability because the Court viewed the law as unsettled at the time of the actions in question. (72a).

dents are not required to affirm or deny a belief or engage or refrain from engaging in a practice prohibited or required by their religion." (24a).[18]

Having found that plaintiffs' Free Exercise rights were not burdened, the Court of Appeals found it unnecessary to reach other issues. (23a). However, Judge Kennedy, while joining the majority, wrote a concurring opinion in which she concluded that even if there had been a burden, it was simply justified by compelling state interests, and that there was no less restrictive alternative to achieve these interests. (25a-30a). Judge Boggs concurred on other grounds. (31a-47a). On October 5, 1987, the Court denied rehearing and declined a suggestion for rehearing *en banc*, with "no judge of this Court having requested a vote on the suggestion. . . ." [19]

ARGUMENT

CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION BELOW IS CONSISTENT WITH DECISIONS OF THIS COURT, AND THE COURT OF APPEALS DECISION CONSTITUTES AN UNEXCEPTIONAL APPLICATION OF WELL ESTABLISHED PRINCIPLES.

I. THERE IS NO CONFLICT.

The Free Exercise clause protects individuals against governmental actions which place a burden on their ability to freely practice sincerely held religious beliefs. While both direct and indirect burdens qualify under the clause, it is clear that for a burden to exist, it must be substantial. As this Court has made clear, a burden exists in the constitutional sense only if the law involves a "grave interference" with religious tenets. *See Wis-*

---

[18] Contrary to plaintiffs' suggestion (Pet. at 22-23), the Court did not hold that plaintiffs' beliefs were not offended by the material. (6a). Indeed, that was stipulated by the parties. *See supra* at 7-8.

[19] "Order," Oct. 5, 1987. (1a).

consin v. Yoder, 406 U.S. 205, 218 (1972). If a plaintiff can demonstrate burden, "[t]he state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest." *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981). In this case, the Court of Appeals reached only the first question, and, finding no unconstitutional burden, rejected plaintiffs' claim.

Contrary to plaintiffs' assertion, the Court of Appeals decision presents no conflict with any decision of this Court or any other court of appeals. This is not a case like *Pierce*[20] in which plaintiffs are being compelled to send their children to the public schools. Nor does this case involve compulsion to affirm a belief, as for example, in *Barnette*,[21] where students were compelled to "declare a belief" by saluting the flag, or as in *Torcaso*,[22] where individuals were required to declare a belief in God as a qualification for public office. And this case does not involve compulsion to engage in an activity that was proscribed by one's religion such as working on the Sabbath (*Sherbert*[23] and *Hobbie*[24]) or in an armaments factory (*Thomas*),[25] which in other cases was made a prerequisite to the receipt of a valued governmental benefit.[26]

---

[20] *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[21] *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943).

[22] *Torcaso v. Watkins*, 367 U.S. 488 (1961).

[23] *Sherbert v. Verner*, 374 U.S. 398 (1963).

[24] *Hobbie v. Unemployment Appeals Comm'n*, 107 S. Ct. 1046 (1987).

[25] *Thomas v. Review Bd.*, 450 U.S. 707 (1981).

[26] *See also Spence v. Bailey*, 465 F.2d 797 (6th Cir. 1972) (compulsory participation in military training burdens Free Exercise rights).

This case, however, involves no such infringement. As the District Court stated, the plaintiffs in this case object to allowing "their children to be exposed to the content of the Holt series." (62a). Similarly, the Court of Appeals concluded that all that was required "was reading and discussing the material in the Holt series, and hearing other students' interpretations of those materials." (22a) As the Court of Appeals pointed out, neither the holdings nor the language of this Court's decisions suggest that exposure to ideas constitutes a burden on Free Exercise rights.[27] (13a-19a).

The decision of this Court in *Wisconsin v. Yoder* makes clear that, ordinarily, objections to exposure to the public school curriculum present no grounds for a Free Exercise claim. As the Court of Appeals noted, "*Yoder* rested on . . . a singular set of facts . . . ." (17a). In *Yoder*, unlike the plaintiffs here, the Old Order Amish "separate[d] themselves from the world and avoid[ed] assimilation into society, and attempt[ed] to shield their children from all worldly influences." (17a).[28] While not objecting to participation in the public elementary school curriculum, they believed that "their children's attendance at high school, public or private, was contrary to the Amish religion and way of life." 406 U.S. at 209. They objected to their children being taken "away from their community, physically and

---

[27] It is noteworthy that none of this Court's decisions suggested that exposure would give rise to a Free Exercise claim. *See Barnette* (no claim that exposure to other children saluting the flag burdened Free Exercise rights); *Thomas* (no claim that exposure to others engaging in armaments production burdened Free Exercise rights).

[28] The plaintiffs here have not formed a separate religious community, and the plaintiff-students are exposed to many of the same themes that they object to in the reading curriculum in the other areas of the curriculum, and in their lives outside of school. *See supra* at 5-6. As the Court of Appeals stated, unlike the Amish in *Yoder*, "the parents in the present case want their children to acquire all the skills required to live in modern society." (18a).

emotionally, during the crucial and formative adolescent period of life." 406 U.S. at 211. As a result of these unique circumstances, the Court concluded that the Old Order Amish had demonstrated the existence of a burden on their Free Exercise rights—"one that probably few other religious groups or sects could make. . . ." 406 U.S. at 236. The *Yoder* case makes quite clear that objections such as those presented here do not rise to the level of a Free Exercise violation.[29]

Nonetheless, plaintiffs suggest that the Court of Appeals decision is inconsistent with decisions of other courts of appeals. In fact, the only decision of another circuit even alleged to be inconsistent with the Court of Appeals decision is the decision of the Eighth Circuit in *Florey v. Sioux Falls School District 49-5*, 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980).[30]

In *Florey*, parents objected to School Board rules which permitted the observance of holidays having "both a religious *and* a secular basis;" provided that music, art, literature and drama having a religious theme could be

---

[29] *See also Duro v. District Attorney*, 712 F.2d 96, 97 (4th Cir. 1983) (distinguishing *Yoder* on similar grounds). Plaintiffs also rely on *Edwards v. Aquillard*, 107 S. Ct. 2573 (1987) and *Wallace v. Jaffree*, 472 U.S. 38 (1985). Pet. at 14-15. Both of these were Establishment clause cases, and neither stands for the proposition that Free Exercise rights are burdened by exposure to wholly secular material.

[30] Plaintiffs also claim that the Court of Appeals decision is inconsistent with the concurring opinion of a single judge in *Grove v. Mead School District No. 354*, 753 F.2d 1528 (9th Cir.), *cert. denied*, 106 S. Ct. 85 (1985). The alleged inconsistency with the concurring opinion provides no ground for certiorari. In any event, that opinion only acknowledged that a claim similar to that raised by the plaintiffs here "would *probably* be sufficient to present a free exercise *question*. . . ." 753 F.2d at 1542 (Canby, J., concurring) (emphasis added). As the Court of Appeals here recognized, this hardly amounts to disagreement with its ruling in this case. (19a-20a).

included in the curriculum, as long as it was presented in an objective manner; and allowed for the use of religious symbols as a teaching aid, if such symbols were displayed as an example of cultural and religious heritage. 619 F.2d at 1314. The rules provided that "students and staff members should be excused from participating in *practices* which are contrary to their religious beliefs unless there are clear issues of overriding concern that would prevent it." 619 F.2d at 1317 n.6 (emphasis added). The Eighth Circuit considered the validity of these rules on their face, and held that the rules did not violate the Establishment clause. Plaintiffs had added a Free Exercise claim as an "apparent afterthought" in the Court of Appeals. *Id.* at 1318 n.7. The court's holding with respect to that claim is not contrary to, and in fact directly supports, the Court of Appeals decision in this case. The court concluded that excusing the students from "participat[ion] in practices," such as the Christmas assembly,[31] was sufficient to obviate any Free Exercise claim, and held that the "public schools are not required to delete from the curriculum all materials that may offend any religious sensibility." *Id.* at 1318.[32]

---

[31] As petitioners' concede (p. 19), apparently the rules were designed to excuse students from such assembly activities as singing Christmas carols. 619 F.2d at 1317 & n.6.

[32] Plaintiffs also assert that the decision below is inconsistent with two district court decisions. Not only is this not a ground for certiorari, but the decisions in fact are not inconsistent. In *Moody v. Cronin*, 484 F. Supp. 270, 271 (C.D. Ill. 1979), the plaintiffs did not object to being exposed to ideas, but to participating in activities with members of the opposite sex in which both they, and the other students, would be wearing "immodest apparel"—an activity explicitly prohibited by their religious beliefs.

In *Wright v. Houston Independent School District*, 366 F. Supp. 1208 (S.D. Tex. 1972), *aff'd per curiam*, 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974), the District Court did not hold that excusing children from the teaching of evolution was con-

In fact, the Court of Appeals decision is consistent with every decision of the lower federal and state courts of which we are aware that has considered claims similar to those of the plaintiffs. In *Duro v. District Attorney, Second Judicial District of North Carolina*, 712 F.2d 96, 97 (4th Cir. 1983), the Fourth Circuit held that the Free Exercise clause was not violated when North Carolina required the plaintiff's children to attend public or private school, despite Duro's religious objection to exposing his children "to others who do not share his religious beliefs. . . ." In *Williams v. Board of Education*, 388 F. Supp. 93, 96 (S.D. W. Va.), *aff'd*, 530 F.2d 972 (4th Cir. 1975), the Free Exercise claims of parents who objected to exposure of their children to a series of textbooks and supplemental materials were rejected, and in *Davis v. Page*, 385 F. Supp. 395 (D.N.H. 1974), the Free Exercise claims of parents who objected to their children's participation in music and health classes and

---

stitutionally required, noting only that the parents should determine whether the school would permit an opt out.

Plaintiffs state that "[s]tate appellate courts have resolved parental challenges to sex education curricula, by recognizing the right of religious dissenters to opt out of sex education classes." (Pet. at 21 n.8.) In fact, in four of the five cases cited by plaintiffs, the schools permitted any objecting parent to have his child opt out of the curricular material that was deemed to be objectionable, and thus the courts were not confronted with the question of whether a student's Free Exercise rights were burdened by compulsory exposure to ideas that were deemed to be objectionable. *See Smith v. Ricci*, 89 N.J. 514, 446 A.2d 501, 505 (1982); *Medeiros v. Kiyosaki*, 52 Haw. 436, 478 P.2d 314, 317-18 (1970); *Citizens for Parental Rights v. San Mateo County Bd. of Educ.*, 51 Cal. App. 3d 1, 124 Cal. Rptr. 68, 83 (1985); *Hobolth v. Greenway*, 52 Mich. App. 682, 218 N.W.2d 98, 99 (1974). In the fifth case, *Valent v. New Jersey State Bd. of Educ.*, 114 N.J. Super. 63, 274 A.2d 832 (1971), the Superior Court of New Jersey denied a motion for summary judgment on the grounds that the issue of whether public schools could require students to participate in a sex education course presented an issue warranting a trial.

As Judge Kennedy's opinion also recognizes, "[t]he state and the Hawkins County School Board also have a compelling interest in avoiding disruption in the classroom." (27a). The Hawkins County Schools utilize an integrated curriculum—the skills and values developed in one subject are reinforced in another. This is particularly true in grades 1-4 where reading is taught throughout the day, rather than in a particular identified period. (3a). Thus, if a student does not participate in the reading curriculum, he will not learn skills that are essential to and part of the other subjects. Moreover, in teaching these other objects, the teachers will continually be confronted with the choice of taking time out to explain to the student what he has missed as a result of his absence from the reading class, thereby disrupting the lesson for the other students, or of having the objecting student miss the point of the lesson entirely.

In addition, as also noted in Judge Kennedy's opinion, "Hawkins County Public Schools have a compelling interest in avoiding religious divisiveness." (28a). Traditionally, one of the most important roles that public education has played has been to cement together the varied, often opposing elements in our society.[36] permitting certain students to opt out of a core part of the public school curriculum, while still participating in other parts of the curriculum because they have religious objections to what the other students are doing, would be directly antithetical to this objective. Indeed, courts have long been concerned with avoiding such division in our public schools. As Justice Frankfurter stated in *McCollum v. Board of Education*, 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring), "[i]n no activity of the State is it more vital to keep out divisive forces than in its schools. . . ."

---

[36] *McCollum v. Board of Educ.*, 333 U.S. 203, 216 (1948) (Frankfurter, J., concurring).

Finally, as Judge Kennedy recognized, if the plaintiffs were to prevail in this case, it "would create a precedent for persons from other religions to request exemptions from core subjects because of a religious objections." (29a). If the plaintiffs were to prevail in this case, classroom teachers, school officials and textbook publishers would all seek to avoid the inclusion of potentially controversial material in the public school curriculum in order to avoid the risk of injunctive and damage relief. (TR 1238-39, 1473-74, 1513-14). This will magnify the adverse impact of the District Court decision and threaten the public schools generally.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

TIMOTHY B. DYK
Counsel of Record
JOHN PAYTON
STEVEN A. SCHNEIDER
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

N.R. COLEMAN, JR.
RONALD W. WOODS
MILLIGAN, COLEMAN, FLETCHER, GABY, KILDAY & WOODS
109 S. Main Street
Commerce Union Bank Building
Greeneville, TN 37743
(615) 639-6811

CHARLES HAMPTON WHITE
Attorney at Law
P.O. Box 2808
Nashville, TN 37219

Counsel for Respondents Hawkins County Public Schools, et al.

January 29, 1988